No. 17-965

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
President of the United States, et al.,
Petitioners,

v.

HAWAII, et al.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEW JERSEY, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether respondents' challenges to §§ 2(a)-(c), (e), (g)-(h) of Proclamation No. 9645 are justiciable.

2. Whether §§ 2(a)-(c), (e), (g)-(h) of the Proclamation exceed the President's authority under the Immigration and Nationality Act and violate the Establishment Clause.

3. Whether the nationwide scope of the preliminary injunction is proper.

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Cases **Page(s)**

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) 24

Bank of America Corp. v. City of Miami, 137 S.Ct. 1296 (2017) 23

Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401 (E.D.N.Y. 2018) 34

Califano v. Yamasaki, 442 U.S. 682 (1979) 29,33

Casa de Maryland v. United States Dep't of Homeland Sec., 2018 WL 1156769 (D. Md. 2018) 34

Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987) 21,22,23

Dimension Fin. Corp. v. Board of Governors, Fed. Reserve Sys., 744 F.2d 1402 (CA10 1984) 32

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) 23

Everson v. Board of Educ., 330 U.S. 1 (1947) 24

Holder v. Martinez Gutierrez, 566 U.S. 583 (2012) 22

IRAP v. Trump, 883 F.3d 233 (CA4 2018) ..... passim

Lemon v. Kurtzman, 411 U.S. 192 (1973) 31

Lexmark Int'l Inc. v. Static Control Components, Inc., 134 S.Ct. 1377 (2014) 19

LG Display Co. v Madigan, 665 F.3d 768 (CA7 2011) 35

Cases **Page(s)**

Madsen v. Women's Health Ctr. Inc., 512 U.S. 753 (1994) 30,33

Massachusetts v. EPA, 549 U.S. 497 (2007) 26

McCreary County, Ky. v. ACLU of Ky., 545 U.S. 844 (2005) 36

Moore v. City of E. Cleveland, 431 U.S. 494 (1977) 10

National Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399 (CADC 1998) 32,35

Regents of the Univ. of Cal. v. United States Dep't of Homeland Sec., 279 F. Supp. 3d 1011 (N.D. Cal. 2018) 34

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 29

Town of Greece v. Galloway, 134 S.Ct. 1811 (2014) 23

Trump v. IRAP, 137 S.Ct. 2080 (2017) 27,28,31

United States v. Mendoza, 464 U.S. 154 (1984) 34

United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001) 29

Virginian Ry. v. Railway Employees, 300 U.S. 515 (1937) 29

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) 27

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008) 27

Wyoming v. Oklahoma, 502 U.S. 437 (1992) 26

Constitutional Provisions **Page(s)**

Cal. Const.
art.I, §4 17
art.I, §7 17
art.I, §8 17
art.I, §31 17
N.M. Const. art.II, §11 17
N.Y. Const. art.I, §11 17
Ill. Const.
art.I, §3 17
art.I, §17 17

Laws

8 U.S.C.
§1101(a)(15) 19
§1152(a)(1) 21,22
§1153(b)(1) 19
§1182(a) 20,21,28
§1182(f) 21
§1185(a)(1) 21
15 U.S.C. §78bb(f)(4) 35
Cal. Civ. Code §51(b) 17
Cal. Gov't Code
§11135-11137 17
§12900 et seq. 17
Conn. Gen. Stat. §46a-60 17
Del. Code §710 et seq. 17
Ill. Comp. Stat.
ch.740, §23/5(a)(1) 17
ch.775, §5/1-102(A) 17
ch.775, §5/10-104(A)(1) 17

Laws **Page(s)**

Mass. Gen. L.
ch.93, §102 17
ch.151B, §1 17
ch 151B, §4 17

Md. Code, State Gov't § 20-606 17

Me. Rev. Stat.
tit. 5, §784 17
tit. 5, §§4551-4634 17

N.M. Stat. §28-1-7 17

N.Y. Exec. Law
§291 17
§296 17

Or. Rev. Stat. §659A.006(1) 17

R.I. Gen. Laws §28-5-7(1)(i) 17

Vt. Stat.
tit. 9, §§4500-4507 17
tit. 21, §495 17

Wash. Rev. Code §49.60.030(1) 17

Miscellaneous Authorities

Adams, *UK Universities Report Rise in Applications*, Guardian (Feb. 4, 2018), at https://tinyurl.com/Guardian-Adams 8

Amar, *The Bill of Rights* (1998) 23

Amdur & Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 Harv. L. Rev. F. 49 (2017), at https://harvardlawreview.org/2017/12/nationwide-injunctions-nationwide-harm/ 33,34

Miscellaneous Authorities **Page(s)**

Barry-Jester, *Trump's New Travel Ban Could Affect Doctors, Especially in the Rust Belt and Appalachia*, FiveThirtyEight (Mar. 6, 2017), at goo.gl/dT2Z6h 18

Bhattarai, *Even Canadians are Skipping Trips to the U.S. After Trump Travel Ban*, Wash. Post (Apr. 14, 2017), at https://tinyurl.com/WashPost-Bhattarai-Tourism 15,16

Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417 (2017) 33,35

Buncome, *Islamophobia Even Worse Under Trump Than After 9/11 Attacks*, Independent (Dec. 27, 2017), at https://tinyurl.com/Buncombe-Islamophobia 26

Carapezza, *Travel Ban's 'Chilling Effect' Could Cost Universities Hundreds of Millions*, NPR (Apr. 7, 2017), at goo.gl/CqkNEy 7,8

Carroll, *Why America Needs Foreign Medical Graduates*, N.Y. Times (Oct. 6, 2017), at https://tinyurl.com/NYT-Carroll-FMGs 12

Center for Am. Entrepreneurship, *Report: Immigrant Founders of the 2017 Fortune 500*, at http://startupsusa.org/fortune500/ 17

Cosgrove, *Fewer Foreign Doctors Are Coming to Study in the United States, Report Shows*, L.A. Times (Mar. 16, 2018), at http://www.latimes.com/business/la-fi-trump-immigration-20180314-story.html 13

Miscellaneous Authorities **Page(s)**

Darling, *University of Oregon International Student Enrollment Drops Again*, Register-Guard (Jan. 13, 2018), at https://tinyurl.com/RegisterGuard-Darling 7

Donache, *Travel Bans and Deportations Threats: How a Hostile Political Climate is Impacting International Faculty Hiring, Collaboration*, Education Dive (Jan. 9, 2018), at https://tinyurl.com/EducationDive-Donache 10

Finnegan, *Amid a National Immigration Battle, Fewer International Doctors Seek U.S. Jobs*, Fierce HealthCare (Feb. 20, 2018), at https://tinyurl.com/FierceHealthcare-Finnegan 18

Frost, The Role and Impact of Nationwide Injunctions By District Courts, Written Testimony for the H. Comm. on the Judiciary (Nov. 30, 2017), at https://ssrn.com/abstract=3104789M 31,33

Immigrant Doctors Project, https://immigrantdoctors.org 18

Institute of Int'l Educ., *Advising International Students in an Age of Anxiety* (Mar. 31, 2017), at http://tinyurl.com/IIEAdvisingStudents 15

Institute of Int'l Educ., *Fall 2017 International Student Enrollment Survey* (Nov. 2017), at https://tinyurl.com/IIE-2017StudentSurvey 7,8

Miscellaneous Authorities **Page(s)**

Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 Harv. L. Rev. F. 56 (2017), at https://harvardlawreview.org/2017/12/class-actions-civil-rights-national-injunction/ 33,35

Meckler & Korn, *Visas Issued to Foreign Students Fall, Partly Due to Trump Immigration Policy*, Wall Street J. (Mar. 11, 2018), at https://tinyurl.com/WSJ-Meckler-Korn 8

NAFSA: Ass'n of Int'l Educators, *International Student Economic Value Tool, 2016-2017 Academic Year Analysis*, at https://tinyurl.com/NAFSA-StudentValueTool 14

National Resident Matching Program, *Statement on Presidential Proclamation 9645 and DACA* (Dec. 2017), at https://tinyurl.com/NRMP-Statement 13

Nowrasteh, *New Government Terrorism Report Provides Little Useful Information*, Cato Inst. (Jan. 16, 2018), at https://www.cato.org/blog/new-government-terrorism-report-nearly-worthless 28

Okahana & Zhou, *International Graduate Applications and Enrollment: Fall 2017* (Council of Graduate Schs., Jan. 2018), at http://cgsnet.org/ckfinder/userfiles/files/Intl_Survey_Report_Fall2017.pdf 8

Petroff, *America is Missing Out on a Tourism Boom*, CNN News (Jan. 16, 2018), at http://money.cnn.com/2018/01/16/news/economy/travel-tourism-us-world/index.html 16

Miscellaneous Authorities **Page(s)**

Petulla, *Entry Ban Could Cause Doctor Shortages in Trump Territory, New Research Finds*, NBC News (Mar. 7, 2017), at http://tinyurl.com/NBCNews-Petulla-MDShortages 7,11,12

Popken, *Tourism to U.S. Under Trump is Down*, NBC News (Jan. 23, 2018), at https://tinyurl.com/NBCNews-Popken 15

Redden, *International Student Numbers Decline*, Inside Higher Ed (Jan. 22, 2018), at https://tinyurl.com/InsideHigherEd-Redden 7

Rodriguez, *Trump's Anti-Immigration Rhetoric, Policies Killing Tourism to the U.S., Industry Analysts Say*, Newsweek (Jan. 6, 2018), at http://www.newsweek.com/trump-killing-tourism-industry-experts-say-772425 15

Sacchetti, *Confusion Rules After Court Order Temporarily Halts Trump Immigration Ban*, Boston Globe (Jan. 30, 2017), at https://tinyurl.com/Globe-Saccheti-Confusion 31

Saleh, *Hospitals in Trump Country Suffer As Muslim Doctors Denied Visas to U.S.*, Intercept (Aug. 17, 2017), at http://tinyurl.com/Intercept-Saleh-MD 19

Siddique, *Nationwide Injunctions*, 117 Columbia L. Rev. 2095 (2017) 32

Spain Overtakes U.S. for Tourism After "Trump Slump", The Week (Jan. 17, 2018), at http://www.theweek.co.uk/90994/spain-overtakes-us-for-tourism-after-trump-slump 16

Miscellaneous Authorities **Page(s)**

Span, *If Immigrants Are Pushed Out, Who Will Care For the Elderly?*, N.Y. Times (Feb. 2, 2018), at https://www.nytimes.com/2018/02/02/health/illegal-immigrants-caregivers.html 18

State Univ. of N.Y., *Legal and Financial Support for Immigration Petitions Policy*, Doc. No.8500, at at https://www.suny.edu/sunypp/documents.cfm?doc_id=418 20

Story, *Commentaries on the Constitution of the United States* (5th ed. 1891) 23

Torbati & Rosenberg, *Visa Waivers Rarely Granted Under Trump's Latest U.S. Travel Ban: Data*, Reuters (Mar. 6, 2018), at https://tinyurl.com/Reuters-Torbati-Rosenberg 9

U.S. Citizenship & Immigration Servs., *Temporary (Nonimmigrant) Workers*, at https://www.uscis.gov/working-united-states/temporary-nonimmigrant-workers 20

U.S. Citizenship & Immigration Servs., *Permanent Workers*, at https://www.uscis.gov/working-united-states/permanent-workers 20

U.S. Dep't of Commerce, *National Travel and Tourism Office, 2017 Monthly Statistics*, at http://tinet.ita.doc.gov/view/m-2017-I-001/table1.asp 15

Miscellaneous Authorities **Page(s)**

U.S. Dep't of State, Bureau of Consular Affairs, *Reciprocity and Civil Documents by Country*, at https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country.html/ 9

U.S. Dep't of State, *Employment-Based Immigrant Visas*, at https://travel.state.gov/content/visas/en/immigrate/employment.html 20

U.S. Dep't of State, *Temporary Worker Visas*, at https://travel.state.gov/content/travel/en/us-visas/employment/temporary-worker-visas.html 20

Williams, *Under Trump, Anti-Muslim Hate Crimes Have Increased at an Alarming Rate*, Newsweek (July 17, 2017), at http://www.newsweek.com/hate-crime-america-muslims-trump-638000 25

INTEREST OF THE AMICI STATES AND SUMMARY OF ARGUMENT

The States of New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia file this brief as amici curiae to support the challenge brought by the State of Hawaii and other respondents to Proclamation No. 9645: the third in a series of presidential orders executed last year that imposed discriminatory bans on the entry into the United States of nationals from several overwhelmingly Muslim countries.[1] The district court entered a preliminary injunction that enjoined enforcement of certain sections of the Proclamation[2] based on respondents' showing of irreparable injury, the balance of the equities, and respondents' strong showing of likely success on the merits of their claims under the Immigration and Nationality Act (INA) (Pet. App. 68a-105a.) The Ninth Circuit affirmed, but narrowed the injunction's scope, limiting it to foreign nationals who have a credible bona fide relationship with a U.S.-based person or entity, citing *Trump v. IRAP*, 137 S.Ct. 2080, 2088 (2017). (Pet. App. 1a-65a.) This Court temporarily stayed the injunction in its entirety, pending the Ninth

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[1] Proclamation No. 9645, §§2(a)-(c),(e),(g)-(h) (Sept. 24, 2017), 82 FR 45,161 (Sept. 27, 2017); Executive Order No. 13,780, §§2(c),6(a)-(b) (Mar. 6, 2017); Executive Order No. 13,769, §§3(c),5(a)-(c),(e) (Jan. 27, 2017).

[2] The injunction does not cover provisions barring entry of a number of government officials from Venezuela and all North Koreans.

Circuit's review and any subsequent proceedings in this Court. 138 S.Ct. 542 (2017).

We submit this brief as amici curiae[3] to support respondents' challenge to the Proclamation, to offer the perspective and experience of sixteen additional sovereign States and the District of Columbia, and to show that the harms inflicted by the Proclamation give rise to state standing and the need for a nationwide injunction. Like its predecessors, the Proclamation's entry ban gravely and irreparably harms our universities, hospitals, businesses, and residents. The injunction—even as narrowed by the Ninth Circuit—provides critical protection against those injuries, which the Proclamation perpetuates and makes permanent. Many of the amici States have brought our own suits challenging the Proclamation's predecessors on the grounds that certain aspects of those Executive Orders violated the Establishment Clause and other constitutional and statutory provisions.[4] We have also filed briefs as amici curiae in this and related cases, including briefs supporting the entry of preliminary injunctions against the previous Orders and the Proclamation, and briefs opposing any stay of such injunctions (including in this Court).[5]

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[3] Amici States file this brief pursuant to Rule 37.4.

[4] Many of amici States challenged the March Order in *Washington v. Trump*, No.17-cv-141 (W.D. Wash. 2017). They challenged the January Order in *Washington*, No.17-cv-141 (W.D. Wash. 2017); Mass. & N.Y. Amicus Br. (15 States, D.C.), *Washington v. Trump*, No.17-35105 (CA9 2017), ECF No.58-2; *Aziz v. Trump*, 2017 WL 580855 (E.D. Va. 2017).

[5] N.Y. Amicus Br. (15 States, D.C.), *Trump v. Hawaii*, No.17A550 (U.S. 2017); N.Y. & Ill. Amicus Br. (15 States, D.C.), *Hawaii v. Trump*, No.17-17168 (CA9), ECF No.71; N.Y. Amicus

All of amici States benefit from immigration, tourism, and international travel by students, academics, skilled professionals, and business-people. The disputed provisions of the Proclamation—like the previous bans—significantly disrupt the ability of our public universities to recruit and retain students and faculty, impairing academic staffing and research, and causing the loss of tuition and tax revenues, among other costs. The Proclamation also disrupts the provision of medical care at our hospitals and harms our science, technology, finance, and tourism industries by inhibiting the free exchange of information, ideas, and talent between the designated countries and our States, causing long-term economic and reputational damage. In addition, the ban has made it more difficult for us to effectuate our own constitutional and statutory policies of religious tolerance and nondiscrimination.

The harms that the Proclamation has caused and threatens to cause amici States are representative of the injuries experienced by respondents here. And those injuries underscore respondents' standing to sue and the appropriateness of the preliminary relief provided below.

Br. (15 States, D.C.), *IRAP v. Trump*, No.17-2231(L) (CA4), ECF No.90; N.Y. & Ill. Amicus Br. (15 States, D.C.), *Hawaii v. Trump*, No.17-17168 (CA9), ECF Nos.15, 23; N.Y. Amicus Br. (17 States, D.C.), *Trump v. IRAP*, *Trump v. Hawaii*, Nos.16-1436, 16-1540 (U.S. 2017); N.Y. Amicus Br. (15 States, D.C.), *Trump v. Hawaii*, No.16-1540 (U.S. 2017); Va. Amicus Br. (16 States, D.C.), *Trump v. IRAP*, Nos.16A-1190, 16A-1191 (U.S. 2017); N.Y. Amicus Br. (16 States, D.C.), *Trump v. IRAP*, Nos.16A-1190, 16A-1191 (U.S. 2017); Ill. Amicus Br. (16 States, D.C.), *Hawaii v. Trump*, No.17-15589 (CA9), ECF No.125; Va. & Md. Amicus Br. (16 States, D.C.), *IRAP v. Trump*, No.17-1351 (CA4), ECF No.153.

The Proclamation has injured rights that the INA confers on States and others by impermissibly interfering with the process that Congress has set forth for our public colleges, universities, and hospitals—as employers—to petition for the approval of prospective employees' entry into the country. In addition, the Proclamation has resulted in cognizable injuries to sovereign rights of the States that the Establishment Clause protects. The disputed provisions have the purpose and effect of implementing a federal anti-Muslim policy that interferes with amici States' efforts to combat religious discrimination within our borders.

The nature of these violations and all of the systemic harms to amici States' myriad interests support the nationwide injunction issued here. The injunction will provide critical protection to the state interests endangered by the Proclamation and mitigate the extent of the harms outlined above. If this Court vacates or further narrows the injunction, amici States will face additional concrete—and likely permanent—harms. Accordingly, we have a strong interest in ensuring that the nationwide injunction continues throughout the course of this litigation. Amici States therefore urge this Court to affirm.

ARGUMENT

I. THE PROCLAMATION PERPETUATES, AND MAKES PERMANENT, THE HARM INFLICTED BY ITS PREDECESSOR ORDERS.

A. Harms to Amici States' Proprietary Interests

The Proclamation blocks the entry of all immigrants and most non-immigrants from several Muslim-majority countries, including those who seek to be students and faculty at our universities, physicians at our medical institutions, employees of our businesses, and guests who contribute to our economies when they come here as tourists or for family visits. The provisions thus irreparably harm the work of our state institutions and treasuries.[6]

Harms to State Colleges and Universities. State colleges and universities rely on faculty and students from across the world. By interfering with the entry of individuals from the designated countries, the Proclamation continues to seriously disrupt our institutions' ability to recruit and retain students and faculty—causing lost tuition revenue, increased administrative burdens, and the expenditure of additional university resources.[7]

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[6] All of amici States support the legal arguments put forth in this brief, although not every specified harm occurs in every State.

[7] *See* Third Am. Compl. ¶¶41,43-44,53,55-56,80,93,105,107-108,125, *Washington v. Trump*, No.17-cv-141 (W.D. Wash.), ECF No.198.

As with the two previous bans, the Proclamation's ban creates serious doubt about whether faculty from the designated countries will be able to obtain the visas they need to timely assume positions with universities in amici States.[8] For example, officials at the University of Massachusetts—which typically hires a dozen new employees from the affected countries annually—are concerned that the Proclamation's now indefinite ban will result in the University being "permanently unable to hire top-ranked potential faculty, lecturers or visiting scholars from the affected countries, because [the Proclamation] may preclude them from reaching the United States to fulfill their teaching obligations."[9]

The Proclamation also continues to disrupt the ability of our universities to recruit foreign students from the designated countries, imperiling hundreds of millions of tuition dollars and other revenue generated from such students, as well as important academic research projects.[10]

Before this series of bans was implemented, amici States' universities had already made numerous offers of admission for 2017-2018 to students from the affected countries and—but for the bans' interference with their continuing admissions process—might have admitted many more.[11] Some schools continued to make admissions offers, including to students from nations designated in the Proclamation. But some of

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[8] *Id.* ¶40.

[9] *Id.* ¶93.

[10] *Id.* ¶¶38,43-46,53,57,86,94-95,105,107,112.

[11] *Id.* ¶¶43-44.

these students withdrew applications; others abandoned entirely their plans to enroll in our programs; and many chose not to apply at all, resulting in a significant decline in international student applications at many of amici States' universities.[12]

In this climate of uncertainty and discrimination, 40% of colleges surveyed across the nation reported a drop in applications from foreign students in the wake of the first two bans.[13] Graduate departments in science and engineering reported that "international student applications for many programs declined by 20 to 30 percent for 2017 programs."[14] And a comprehensive study released just last month documents significant declines in both international undergraduate and graduate enrollment at American colleges and universities in Fall 2017 when compared to Fall 2016—the first such decline in several years.[15]

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[12] *Id.* ¶¶37,45-46,53,122.

[13] Carapezza, *Travel Ban's 'Chilling Effect' Could Cost Universities Hundreds of Millions*, NPR (Apr. 7, 2017) (internet). (For authorities available on the internet, URLs are listed in the table of authorities.)

[14] Petulla, *Entry Ban Could Cause Doctor Shortages in Trump Territory, New Research Finds*, NBC News (Mar. 7, 2017) (internet).

[15] Redden, *International Student Numbers Decline*, Inside Higher Ed (Jan. 22, 2018) (internet) (analyzing National Science Foundation report); *see also* Institute of Int'l Educ., *Fall 2017 International Student Enrollment Survey ("IIE Survey")* (Nov. 2017) (internet) (average decline of 7% in new international students at 500 institutions); Darling, *University of Oregon International Student Enrollment Drops Again*, Register-Guard (Jan. 13, 2018) (internet) (international enrollment dropped by 315 students, "representing a more than $6 million decrease in annual revenue").

Researchers have singled out the continuing travel ban as one of the key factors contributing to this decline, and the education community remains concerned that it "might have hampered the global competitiveness of the United States and its ability to attract the best and brightest" prospective students.[16] Countries that are perceived as more welcoming have seen a jump in both applications and enrollment.[17] This drain of highly qualified student talent will continue under the Proclamation.

The ability of state institutions of higher education to retain existing foreign students and faculty is also compromised by the Proclamation's broad, continuing ban. Amici States currently have hundreds of students and faculty members from the targeted countries. For example, Washington State University has 140 such students and 9 faculty members.[18] The University of Massachusetts has 180 similarly situated students and 25 employees.[19] There are 529 such students in the University of California system; 297 at the State

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[16] Okahana & Zhou, *International Graduate Applications and Enrollment: Fall 2017* at 5 (Council of Graduate Schs., Jan. 2018) (internet) (17% decline in applications from the Middle East and North Africa; 18% decline from Iran); *see also IIE Survey*, *supra* at 4-5 (finding visa delays and denials are primary factor contributing to international student decline among reporting institutions).

[17] Carapezza, *supra*; *see also* Meckler & Korn, *Visas Issued to Foreign Students Fall, Partly Due to Trump Immigration Policy*, Wall Street J. (Mar. 11, 2018) (internet); Adams, *UK Universities Report Rise in Applications*, Guardian (Feb. 4, 2018) (internet).

[18] Third Am. Compl. ¶¶35-36.

[19] *Id.* ¶¶91,94.

University of New York; and 61 at Portland State University.[20]

Many of these students will need to apply for additional visas during the course of their studies because only single-entry visas are permitted from some of the affected countries, and because those visas are valid only for relatively short periods.[21] Current students and faculty members will face obstacles to renewal—if renewal is even possible under the Proclamation, which prohibits the issuance of most non-immigrant visas for nationals of the affected countries. Thus, certain students who are no longer eligible for student visas (e.g., Syrians) may be required to discontinue their studies. Other students will face the prospect of not knowing whether they may be denied continued access to the institutions where they are studying, particularly if the Proclamation calls for them to be subject to heightened vetting (e.g., Iranians and Somalis).[22] Any visa delays or

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[20] *Id.* ¶¶53,58,108,124.

[21] U.S. Dep't of State, Bureau of Consular Affairs, *U.S. Visa: Reciprocity and Civil Documents by Country* (internet) (search by country and visa types F,M).

[22] Although the Proclamation gives consular officers discretion to permit entry in individual cases, it does not describe the process for applying for a waiver, specify a time frame for receiving a waiver, or set concrete guidelines for waiver issuance, beyond listing circumstances in which waivers "may be appropriate." §3(c). And there is no reason to believe that waivers are likely to be issued in the ordinary case. *Id.* Indeed, recent State Department data shows "a high refusal rate"—over 98%—for the three months since the Proclamation has been in effect. Torbati & Rosenberg, *Visa Waivers Rarely Granted Under Trump's Latest U.S. Travel Ban: Data*, Reuters (Mar. 6, 2018) (internet). Thus,

denials jeopardize not only these individuals' education or employment, but also any grant funding and research projects that depend on their work.[23]

Individuals whose visas remain valid for a longer duration will also be affected. The presumption of exclusion created by the Proclamation may chill them from participating in educational, professional, or personal obligations that require travel outside the country. And while in the country, they will face the hardship of being unable to receive visits from overseas parents, spouses, children, and other relatives—a constitutionally cognizable hardship.[24] Indeed, many faculty members at amici States' universities are contemplating leaving their current positions for opportunities in more welcoming countries in the wake of the Proclamation's now indefinite ban.[25] And the ban's chilling effect will likely reverberate beyond the designated countries to dissuade even scholars from other countries from U.S.-based research or employment.[26]

Foreign-national scholars employed or recruited by our universities typically have specialized expertise that cannot easily be replaced. Universities that are delayed in or prevented from recruiting international

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the impact of the Proclamation's ban is not mitigated by these procedures.

[23] Third Am. Compl. ¶¶36,42,55,91,94.

[24] *Id.* ¶¶24-25,37-38,54,78-79,91,94,104-112,123. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 504 (1977).

[25] *Id.* ¶¶38,42,111.

[26] Donache, *Travel Bans and Deportations Threats: How a Hostile Political Climate is Impacting International Faculty Hiring, Collaboration*, Education Dive (Jan. 9, 2018) (internet).

faculty thus suffer significant financial and reputational harm, including lost funding for research.[27] Our educational institutions have needed to expend considerable amounts of scarce resources to make contingency plans for filling unexpected gaps in faculty rosters caused by the exclusion or possible departure of scholars from the designated countries. Despite this effort, there is reason to doubt that our universities will be able to meet all of their needs.[28]

While public universities are always subject to federal immigration law and policy, these successive bans have injured them unexpectedly, by upending with no advance notice the established framework around which they have designed their faculty recruitment and student enrollment processes.[29] This has left seats unfilled, tuition dollars irretrievably lost, and important academic programs and research in peril. It has also inhibited the free exchange of information, ideas, and talent that is so essential to academic life and our state universities' missions by causing the loss of students and faculty from the affected nations and beyond.[30]

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[27] Third Am. Compl. ¶¶38,43-44,55,105-106,112; *see* Donache, *supra* (experts warning of "disruptive effects" including "on hiring and collaboration with international faculty and researchers" and "damag[ing] the opportunity for advancements in research").

[28] Third Am. Compl. ¶55 (describing "disrupt[ion]" to California universities' faculty hiring); *id.* ¶95 (University of Massachusetts's ability "to hire top-ranked" faculty "severely" impacted).

[29] Petulla, *supra*.

[30] Third Am. Compl. ¶¶38,105-106.

Harms to State Hospitals and Medical Institutions. The Proclamation's ban, like its predecessors, has created staffing disruptions in state medical institutions, which employ physicians, residents, researchers, and other professionals from the designated countries.[31]

Foreign-national residents at public hospitals often provide crucial services, such as caring for some of the most underserved populations in our States.[32] They are assigned to our university hospital residency programs through a computerized "match" that, after applications and interviews, ranks and assigns candidates to programs nationwide.[33] Many programs regularly match residents from the affected countries. If a program's matched residents are precluded from obtaining a visa under the Proclamation, as many of them were under the predecessor bans, the program risks having an insufficient number of residents to meet staffing needs.[34] This continuing uncertainty is of particular concern in view of the indefinite duration of the Proclamation's ban. The practical effect of this dilemma is that our States' programs may not be able to rank highly qualified candidates from the designated countries going forward, because there is substantial reason to believe that they will not be able to begin

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[31] *Id.* ¶127.

[32] *Id.* ¶115.

[33] *Id.* ¶116.

[34] Petulla, *supra*; Carroll, *Why America Needs Foreign Medical Graduates*, N.Y. Times (Oct. 6, 2017) (internet) (United States does not have enough medical school graduates "to fill residency slots").

their residencies.[35] Echoing this very concern, the National Residency Matching Program concluded that the Proclamation's restrictions "will have a significant impact" on the 2018 match.[36]

In addition, if current residents who are nationals of the designated countries cannot renew or extend their visas—as the Proclamation threatens—state residency programs will be unable to continue to employ them; these multi-year programs will then be left with unfilled positions, and further staffing gaps will result.[37] Such disruptions will translate into uncertainty in residency programs, as well as threats to the quality of healthcare services.[38] And because patients must be cared for, our medical facilities must quickly adapt to any staffing complications resulting from the Proclamation—and must spend precious time and resources preparing to do so.[39]

Diminished Tax Revenues and Broader Economic Harms. In addition to losing the tuition and other fees paid by students at our universities, amici States have suffered—and will continue to suffer—other direct and substantial economic losses

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[35] Third Am. Compl. ¶¶60,115.

[36] National Resident Matching Program, *Statement on Presidential Proclamation 9645 and DACA* (Dec. 2017) (internet). The number of "noncitizen international medical graduates" who applied for 2018 residency programs also declined for the second consecutive year. Cosgrove, *Fewer Foreign Doctors Are Coming to Study in the United States, Report Shows*, L.A. Times (Mar. 16, 2018) (internet).

[37] Third Am. Compl. ¶115.

[38] See *infra* 18-19.

[39] Third Am. Compl. ¶59 (shortage of "even one physician" can have "serious implications" in underserved areas).

as a result of the Proclamation's ban, just as we did under its predecessors. Every foreign student, tourist, and business visitor arriving in our States contributes to our economies through purchases of goods and services and the tax receipts that their presence generates. Despite the injunctions issued against the Proclamation and its predecessors, this series of bans during the past 14 months has blocked or dissuaded thousands of individuals—potential consumers all—from entering amici States, thereby eliminating the significant tax contributions those individuals would have made.[40] That lost revenue will never be recovered and the lasting economic damage cannot be undone, even if respondents ultimately prevail.

The contribution of foreign students to our economies is immense. Nationwide, during 2016-2017, over one million international students "contributed $36.9 billion and supported more than 450,000 jobs to the U.S. economy": nearly $6 million and 70,000 jobs in California, $4.6 million and 56,000 jobs in New York, and $2.7 million and 36,000 jobs in Massachusetts.[41] And a survey conducted in the months following the issuance of the initial ban found that "more than 15,000 students enrolled at U.S. universities during 2015-16 were from the [six] countries named in" the revised Executive Order; more than half of those students attended institutions in amici States and Hawaii; and nationwide, "these students contributed $496 million to the U.S. economy, including tuition,

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[40] *Id.* ¶¶31-32,62,75,87-88,120-121.

[41] NAFSA: Ass'n of Int'l Educators, *International Student Economic Value Tool, 2016-2017 Academic Year Analysis* (internet).

room and board and other spending."[42] New York and Illinois had nearly 1,000 nationals from the countries designated in the revised Order studying in each State in 2015-2016, who collectively contributed approximately $30 million to each State's economy.[43] Those students have also brought indirect economic benefits to our States by contributing to innovation in academic and medical research.

Tourism is another critical component of amici States' economies.[44] As a result of the successive bans, including the Proclamation's ban, the United States in 2017 saw a 4% decline in the number of international travelers to the country, at a loss of $4.6 billion and 40,000 jobs.[45] For 2018, industry analysts predict 6.3 million fewer tourists and another $10.8 billion in lost revenue.[46] Industry analysts have found a direct correlation between the bans and the significant drop

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[42] Institute of Int'l Educ., *Advising International Students in an Age of Anxiety* 3 (Mar. 31, 2017) (internet).

[43] *Id.*, app. 1.

[44] Rodriguez, *Trump's Anti-Immigration Rhetoric, Policies Killing Tourism to the U.S., Industry Analysts Say*, Newsweek (Jan. 6, 2018) (internet) (in 2016, tourism generated more than $1.5 trillion in economic output and supported 7.6 million jobs, 1.2 million of which were directly supported by international traveler spending).

[45] Popken, *Tourism to U.S. Under Trump is Down*, NBC News (Jan. 23, 2018) (internet); *see also* U.S. Dep't of Commerce, National Travel and Tourism Office, *2017 Monthly Statistics* (internet).

[46] Bhattarai, *Even Canadians are Skipping Trips to the U.S. After Trump Travel Ban*, Wash. Post (Apr. 14, 2017) (internet); *see also* Third Am. Compl. ¶¶30-32 ("chilling effect" on tourism in Washington); *id.* ¶¶52,61 (decreased tourist travel to California resulting in significant losses in tourism revenues).

in tourism,[47] even from travelers from non-designated countries.[48] The now indefinite ban will also lead to the loss of hundreds of thousands more tourism-related jobs held by our residents.[49]

Absent relief from the courts, including interim relief, these broad chilling effects will likely continue. This is hardly surprising in view of petitioners' clear message to the world that foreign visitors—particularly those from certain regions, countries, or religions—are unwelcome. Indeed, the Proclamation has made this message clearer and more permanent.

The Proclamation's ban also continues the profound harms that the predecessor bans have inflicted on amici States' ability to remain internationally competitive destinations for businesses in science, technology, finance, and healthcare, as well as for entrepreneurs. Even a temporary disruption in our ability to attract the best-qualified individuals and entities world-wide—including from the affected countries—puts the institutions and businesses in our States at a competitive disadvantage in the global marketplace, particularly where the excluded individuals possess specialized skills.[50] And now that the

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[47] Petroff, *America is Missing Out on a Tourism Boom*, CNN News (Jan. 16, 2018) (internet) (Trump administration's "controversial policies on immigration and travel" one of "key factors" behind the decline in American tourism); *Spain Overtakes U.S. for Tourism After "Trump Slump"*, The Week (Jan. 17, 2018) (internet) (travel data company finds "direct correlation" between travel ban and U.S. tourism drop).

[48] Bhattari, *supra* ("[d]emand for flights to the United States has fallen in nearly every country" since January 2017).

[49] Third Am. Compl. ¶¶63-64.

[50] *Id.* ¶¶18-23,33,51-52,69-70,74,86-87,113,118,120-123.

initially temporary bans have become an indefinite ban, petitioners' message of intolerance more deeply threatens amici States' ability to attract and retain the foreign professionals, entrepreneurs, and companies that are vital to our economies.[51]

B. Harms to Amici States' Sovereign and Quasi-Sovereign Interests

Decreased Effectiveness of Anti-Discrimination Laws. Amici States have exercised their sovereign prerogatives to adopt constitutional provisions and statutes protecting their residents from discrimination. These laws prohibit our residents and businesses—and, indeed, many of amici States ourselves—from taking national origin and religion into account when extending employment offers and other opportunities.[52] The Proclamation interferes with the effectiveness of these laws by encouraging discrimination against Muslims in general, and nationals of the affected countries in particular.

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[51] *See* Center for Am. Entrepreneurship, *Report: Immigrant Founders of the 2017 Fortune 500* (internet) (43% of 2017 Fortune 500 businesses were founded by immigrants or their children, including 32 in New York; California, 25; Illinois, 18; and Virginia, 13).

[52] *See, e.g.*, Cal. Const. art.I, §§4,7-8,31; Cal. Civ. Code §51(b); Cal. Gov't Code §§11135-11137,12900 et seq.; Conn. Gen. Stat. §46a-60; 19 Del. Code §710 et seq.; Ill. Const. art. I, §§3,17; 740 Ill. Comp. Stat. 23/5(a)(1); 775 Ill. Comp. Stat. 5/1-102(A), 5/10-104(A)(1); 5 Me. Rev. Stat. §§784, 4551-4634; Md. Code, State Gov't §20-606; Mass. Gen. L. ch.93, §102; *id.* ch.151B, §§1,4; N.Y.Const. art.I, §11; N.Y. Exec. Law §§291,296; N.M.Const. art.II, §11; N.M. Stat. §28-1-7; Or. Rev. Stat. §659A.006(1); R.I. Gen. Laws §28-5-7(1)(i); 9 Vt. Stat. §§4500-4507; 21 Vt. Stat. §495; Wash. Rev. Code §49.60.030(1).

Harms to Residents Seeking Medical Care. Like its predecessors, the Proclamation's ban will harm residents seeking medical care in our States. The countries designated in the Proclamation are important sources of physicians who provide healthcare to our residents, particularly in underserved areas of our States.[53] Indeed, many such physicians work in primary care at a time when primary care physicians are in short supply in many areas across the country.[54] The Proclamation thus impedes our efforts to recruit and retain providers of essential medical services.[55]

At least 7,000 physicians practicing in the United States attended medical school in one of the six countries designated in the revised Executive Order (five of which remain designated in the Proclamation), and these physicians provide 14 million appointments a year, 2.3 million of which are in areas with "a shortage of medical residents and doctors."[56] When

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[53] Third Am. Compl. ¶26 (nearly 200 such physicians in Washington); *id.* ¶58 (191 such physicians in California); *id.* ¶114,116 (500 such physicians in New York).

[54] *Id.* ¶¶27,58-59,116,128-129; *see also* Carroll, *supra* (foreign-trained physicians comprise over 40% of the American primary care workforce, and are also more likely to work in nonurban areas with physician shortages); Span, *If Immigrants Are Pushed Out, Who Will Care For the Elderly?*, N.Y. Times (Feb. 2, 2018) (internet) (one in four direct-care workers in American nursing homes is foreign-born, including 11,000 from the designated countries).

[55] Third Am. Compl. ¶¶27-28,58,128-129; *see also* Finnegan, *Amid a National Immigration Battle, Fewer International Doctors Seek U.S. Jobs*, Fierce HealthCare (Feb. 20, 2018) (internet).

[56] Immigrant Doctors Project, https://immigrantdoctors.org; *see also* Barry-Jester, *Trump's New Travel Ban Could Affect*

physicians from the designated countries are unable to commence or continue their employment at public hospitals, the ensuing staffing disruptions will adversely affect the quality of our healthcare services and put the health of our communities at risk.[57]

II. THE PROCLAMATION'S HARMS ARE COGNIZABLE UNDER THE IMMIGRATION AND NATIONALITY ACT

To press a statutory claim, a plaintiff must show among other things that the interests the plaintiff seeks to vindicate "fall within the zone of interests protected by the law invoked." *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1388 (2014). As the Ninth Circuit correctly held, Hawaii's "efforts to enroll students and hire faculty members who are nationals from the [targeted] countries fall within the zone of interests of the INA" (Pet. App. 22a), a statute that contains numerous provisions governing the admission of foreign-national students, scholars, and faculty into the country on temporary non-immigrant visas[58] or employment-based immigrant visas.[59]

Indeed, our state colleges and universities are in many cases the entities petitioning for approval of a

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Doctors, Especially in the Rust Belt and Appalachia, FiveThirtyEight (Mar. 6, 2017) (internet).

[57] Third Am. Compl. ¶¶27,58-59,116,128; Saleh, *Hospitals in Trump Country Suffer As Muslim Doctors Denied Visas to U.S.*, Intercept (Aug. 17, 2017) (internet); *see also* Finnegan, *supra* (medical community fearful of ban's "detrimental impact on the healthcare system").

[58] *See, e.g.*, 8 U.S.C. §1101(a)(15)(F),(H),(J),(O).

[59] *See, e.g.*, 8 U.S.C. §1153(b)(1)(A),(B); (b)(2); (b)(3)(A)(ii).

potential employee's entry into the country, bringing them directly within the ambit of the INA. As employers, our universities sponsor and file employment-based immigrant or non-immigrant/ temporary worker petitions with U.S. Citizenship and Immigration Services (USCIS) on behalf of certain of our prospective employees.[60] Only after the employer's petition is approved can the prospective employee apply for and receive a work visa. In some cases, the INA also requires the employer to obtain an approved labor certification from the Department of Labor, *see* 8 U.S.C. §1182(a)(5)(A), before filing a petition.[61]

The Proclamation, by interfering with this process, has substantially disrupted the ability of our public institutions to meet their academic staffing needs, resulting in increased administrative burdens and the expenditure of additional resources. See *supra* 5-6, 10-11. These bans have also caused the wastage of funds that amici States have spent preparing visa petitions for employees or prospective employees. For example, the State University of New York provides legal and financial support for the immigrant and non-immigrant work petitions of certain prospective employees, including teaching faculty, researchers, and physicians.[62] Specifically, the University assists in preparing "employment-based petitions and

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[60] U.S. Dep't of State, *Temporary Worker Visas* (internet); USCIS, *Temporary (Nonimmigrant) Workers* (internet); U.S. Dep't of State, *Employment-Based Immigrant Visas* (internet).

[61] USCIS, *Permanent Workers* (internet); *Employment-Based Immigrant Visas*, *supra*; *Temporary Worker Visas*, *supra*.

[62] State Univ. of N.Y., Legal and Financial Support for Immigration Petitions Policy, Doc. No.8500, §§I(C),II(A)(internet).

applications for nonimmigrant categories such as the H-1B Temporary Worker, O-1 Extraordi[illegible]Ability and the TN-1 NAFTA categories."[63] In addition to such "employment sponsorship," the University also provides "related financial support for standard processing, government filing fees and [other related] costs."[64] And for those working under employment-based immigrant visas, the University will help "prepare petitions and applications" for "permanent residence based on University employment."[65]

Because state universities acting as employers are direct and necessary participants in the INA's scheme for the filing of employment-based petitions, they fall within its zone of interests. Petitioners now claim for the first time that no respondents, including Hawaii, have any cognizable interest "in the denial of a visa or entry to an alien abroad" *under "the particular INA provisions they invoke"* (Pet. Br. 24-25 [emphasis added]), namely, 8 U.S.C. §§1152(a)(1)(A), 1182(f), and 1185(a)(1). But this Court has already made clear that when "considering whether the 'zone of interest' test provides or denies standing," it is "not limited to considering the statute under which respondents sued, but may consider any provision that helps [the Court] understand Congress' overall purposes" in the comprehensive scheme as a whole. *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 401 (1987); *see also id.* at 396-97 (observing the phrase "a relevant statute" in the Administrative Procedure Act, 5 U.S.C. §702, is to be interpreted "broadly"). In *Clarke*, the Court rejected an argument that focused "too narrowly" on only one

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[63] *Id.* §I(C).

[64] *Id.* §§II(A),III(F)(1)-(2).

[65] *Id.* §I(C).

section of the National Banking Act without "adequately plac[ing]" that section in the act's "overall context." *Id.* at 401. And the Court held the plaintiff had standing to sue after considering related provisions of the Act, as well as the fact that "[t]he interest [plaintiff] assert[ed] ha[d] a plausible relationship to the policies underlying [those provisions]." *Id.* at 403. Likewise, here, in evaluating whether Hawaii meets the zone-of-interests test, this Court should not consider in isolation the particular INA provisions alleged to have been violated, but should take into account the complex and inter-connected regulatory structure of the INA as a whole, as well as the INA's overall objective of facilitating the adjudication and issuance of immigrant and non-immigrant visas to those who meet its criteria for eligibility—including for family reunification and employment purposes.[66]

While the States certainly understand that there is no absolute right to the issuance or renewal of a particular individual's visa, our institutions—like other employers of foreign nationals—have come to rely on a degree of predictability in the visa system as a whole in making their faculty hiring and student admissions decisions, as well as an expectation that visa determinations will be free from discriminatory animus, including by virtue of the protection afforded by one of the specific provisions at issue here. *See* 8 U.S.C. §1152(a)(1)(A) (prohibiting discrimination "in the issuance of an immigrant visa" based on "the person's race, sex, nationality, place of birth, or place

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[66] *See Holder v. Martinez Gutierrez*, 566 U.S. 583, 594 (2012) (recognizing that the INA's purposes include "promoting family unity" and "providing relief to aliens with strong ties to the United States").

of residence"). All of this was abruptly upended by the series of successive travel bans, including the now-permanent ban enshrined in the Proclamation, injuring the States' statutorily protected interests in ways that undeniably "implicate[ ] the policies of the [INA]," *Clarke*, 479 U.S. at 403. Accordingly, petitioners are mistaken in asserting that Hawaii falls outside the INA's zone of interests and thus lacks standing to assert its statutory challenge.[67]

III. THE PROCLAMATION'S HARMS ARE COGNIZABLE UNDER THE ESTABLISHMENT CLAUSE

Petitioners' claim (Br. 26-30) that States lack cognizable Establishment Clause interests is flatly contradicted by the original meaning and purpose of the Clause. One of the Clause's original purposes was to prevent the federal government from forcing its religious preferences upon States.[68] As Justice Thomas has noted, in this regard the Clause was designed to serve as "a federalism provision." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring); *see also Town of Greece v. Galloway*, 134 S.Ct. 1811, 1836 (2014)

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[67] *See Bank of America Corp. v. City of Miami*, 137 S.Ct. 1296, 1303 (2017) (City had standing to assert statutory claim where injuries were "*arguably* within the zone of interests" protected by the statute) (emphasis in original); *Clarke*, 479 U.S. at 399 (zone-of-interests test "is not meant to be especially demanding" and only forecloses suit when a "plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute").

[68] *See* Story, *Commentaries on the Constitution of the United States*, §1879, at 633-34 (5th ed. 1891); Amar, *The Bill of Rights* 32-42, 246-57 (1998).

(Thomas, J., concurring) ("T]he States are the particular beneficiaries of the Clause."). To be sure, States' original power over religious matters was later limited by the Fourteenth Amendment. *Everson v. Board of Educ.*, 330 U.S. 1 (1947). But while States are no longer free to establish official churches, the Constitution continues to protect state efforts to welcome diverse religious groups and combat religious discrimination to the extent allowed by federal law, including through enforcement of our own state anti-discrimination laws. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607-08 (1982) (recognizing State's interests in ensuring that its residents are "not excluded from the benefits that are to flow from participation in the federal system" and in "securing observance of the terms under which it participates in" that system).

The disputed provisions of the Proclamation are tainted by anti-Muslim animus in violation of the Establishment Clause. As respondents explain (Br. 6-12, 61-76), the Proclamation did not cure the animus that infected the prior Orders, but continues the same federal policy, paving the way for a religious test for entry into the country and affecting the religious makeup of our States and communities. Even setting aside any pre-election statements by the President and his close advisors, "the President's inauguration did not herald a new day." *IRAP v. Trump* ("*IRAP II*"), 883 F.3d 233, 266 (CA4 2018). As the Fourth Circuit has explained, in view of the President's continuing and undisputed statements of anti-Muslim bias, and the proximity of those statements to his proposed Muslim ban and his various executive actions on the subject—including the Proclamation, which he and his advisors described as having the same goal as the

prior Orders—an objective observer could only conclude that the primary purpose of the Proclamation was "to exclude Muslims from the United States." *Id.* at 264-69.[69]

Contrary to petitioners' characterization (Br. 28), amici States are not simply suffering the "indirect effects" of alleged discrimination against foreign nationals with no constitutional rights of their own. Rather, by unlawfully injecting religious bias into our Nation's immigration policy, the Proclamation impairs the constitutionally protected interest that amici States and Hawaii possess in prohibiting religious discrimination and maintaining welcoming communities where people of all faiths or no faith feel welcome. It does so not only by excluding large numbers of Muslims, but also by contributing to an environment of fear and insecurity among our residents that runs counter to amici States' deeply held commitment to inclusiveness and equal treatment.[70] Moreover, blocking the admission of

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[69] Unlike a statute, which is the act of a collective body, and therefore presents some difficulties in discerning legislative intent from the statements of individual legislators, the Proclamation is the act of a single official, and there is no such barrier to treating the President's statements as probative of his intent in promulgating it. The multi-agency review conducted by other allegedly non-biased government officials (Pet. Br. 58,63,71) does not save the Proclamation. As the Fourth Circuit explained, because "our Constitution describes a 'unitary executive'" and the President "alone had the authority to issue the Proclamation[,] he is responsible for its substance and purpose." *IRAP II*, 883 F.3d at 268 n.16.

[70] See *supra* 17-18; *see also* Williams, *Under Trump, Anti-Muslim Hate Crimes Have Increased at an Alarming Rate*, Newsweek (July 17, 2017) (internet) (91% increase in anti-

individuals based on their religious beliefs has a substantial harmful effect on amici States and Hawaii by, among other things, reducing tax revenues—an effect which by itself is sufficient to establish standing. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 449-50 (1992).

Thus, under such "highly unusual facts," *IRAP II*, 883 F.3d at 269, Hawaii and amici States have standing to protect their own interests by vindicating the structural dictates of the Clause. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007).

IV. THE PROCLAMATION'S VIOLATIONS AND THE ACTUAL AND THREATENED HARMS TO PUBLIC INTERESTS THROUGHOUT THE COUNTRY WARRANTED A NATIONWIDE PRELIMINARY INJUNCTION

The Ninth Circuit correctly held that preliminary relief was justified to restrain the Proclamation's likely violations of the INA, and that the nationwide scope of that relief was justified by the nature of the violation, as well as the nationwide reach of the injuries to public interests in particular (Pet. App. 56a-61a). *See also IRAP II*, 883 F.3d at 270-73 (affirming similar nationwide preliminary injunction of the Proclamation based on likelihood of success of Establishment Clause challenge).

Muslim hate crimes in U.S. in first half of 2017 as compared to same period in 2016); Buncome, *Islamophobia Even Worse Under Trump Than After 9/11 Attacks*, Independent (Dec. 27, 2017) (internet) (1,851 incidents of Islamophobia between January and September 2017).

A. A Nationwide Injunction Is Essential in This Case

The Ninth Circuit properly concluded that the harms, equities, and the public interest weigh decidedly in favor of preliminary relief.[71] *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (factors to be considered); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (balancing of equities requires courts to "pay particular regard for the public consequences").[72]

This Court reached a similar conclusion when it considered petitioners' application to stay the preliminary injunctions issued against the Proclamation's predecessors. The Court there evaluated the same "relative harms" to the parties, "as well as the interests of the public at large." 137 S.Ct. at 2087. After balancing those factors, the Court left significant portions of those injunctions in place to protect "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States," in view of the significant public interests at stake. *Id.* at 2088.

The equities at stake here weigh even more strongly in favor of preliminary relief than in the previous litigation. *See id.* at 2087 ("[c]rafting a preliminary injunction" is "often dependent as much on the equities of a given case as the substance of the

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[71] Indeed, petitioners do not advance any criticism of the balancing of the equitable factors performed by the courts below.

[72] The injunction was also appropriate because respondents have made a strong showing of the likelihood of success on the merits of their statutory and constitutional claims. Hawaii Br. 30-76; *Winter*, 555 U.S. at 20.

legal issues it presents"). Not only have defendants persisted in their failure to provide any concrete evidence of true national security risk,[73] but the Proclamation's ban is now indefinite and will likely result in permanent—as opposed to temporary—harms to respondents and others who are similarly situated, including amici States and their residents. *Id.* at 2088 (concluding that claimed national security interests did not outweigh such harms).

The Ninth Circuit adopted the precise balancing previously struck by this Court, observing that the injunction simply "preserve[s] the status quo as it existed prior to the Proclamation while the merits of the case are being decided" because petitioners have "been able to successfully screen and vet foreign nationals from the countries designated in the Proclamation under current law for years."[74] (Pet. App. 59a.)

Moreover, the scope of the injunction—even as narrowed by the Ninth Circuit—appropriately accounted for the nature of the Proclamation's violations and the need to restrain the systemic, nationwide harm perpetuated by it, including the harms to amici States. District courts exercising their equity jurisdiction enjoy broad and "sound discretion

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[73] *See* Nowrasteh, *New Government Terrorism Report Provides Little Useful Information*, Cato Inst. (Jan. 16, 2018) (internet) (most recent government report "produces little new information on immigration and terrorism and portrays some misleading and meaningless statistics as important findings").

[74] Current immigration law contains well-established, individualized vetting processes, which already permit the exclusion of foreign nationals who present a national security concern, 8 U.S.C. §1182(a)(3), or about whom officials lack adequate information, *id.* §1182(a)(7).

to consider the necessities of the public interest when fashioning injunctive relief." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001). Indeed, "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than... when only private interests are involved." *Virginian Ry. v. Railway Employees*, 300 U.S. 515, 552 (1937).

Consistent with these principles, the Ninth Circuit recognized that the myriad harms flowing from the Proclamation's ban—including to the proprietary interests of States—exemplify the public interests affected, and would not fully be addressed by injunctive relief limited to redressing only respondents' individual injuries (Pet. Br. 73-74). The extensive, particularized harms to amici States thus underscore the appropriateness of the injunction's nationwide scope (Pet. App. 60a); *supra*, Point I; *see also IRAP II*, 883 F.3d at 271 (noting the Proclamation's "broad[] deleterious effect on the public interest").

As the Ninth Circuit further observed, "[a]ny application of §2 of the Proclamation would exceed the scope of §1182(f) [and] violate §1152(a)(1)(A)" (Pet. App. 62a-63a). The Fourth Circuit similarly concluded that because "the Proclamation was issued in violation of the Constitution, enjoining it only as to [the p]laintiffs would not cure its deficiencies." *IRAP II*, 883 F.3d at 273. A nationwide injunction was thus additionally warranted because "the scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("As with any equity case, the nature of the violation determines the scope of the remedy.").

The injunction is also particularly appropriate here given the immigration context—both because a nationwide scope is "necessary to provide complete relief" to respondents, *Madsen v. Women's Health Ctr. Inc.*, 512 U.S. 753, 765 (1994), and in view of the importance of uniformity in the application and enforcement of federal immigration law. Petitioners assert (Br. 74) that "[t]he desirability of uniformity has nothing to do with the extent of respondents' own putative injuries"; but this cursory statement improperly conflates the two distinct concerns.

First, as the Ninth Circuit explained (Pet. App. 62a), "it would be impracticable or impossible for [Hawaii] to name all those who would apply to the University of Hawaii... but have been chilled or prevented by the Proclamation from doing so." Thus, although a nationwide injunction may have the effect of protecting non-party individuals and entities like amici States from related harm, such an effect does not in and of itself make the injunction impermissibly overbroad where the scope is also "necessary to give [Hawaii] a full expression of [its] rights." (*Id.*)

Second—and notwithstanding the Proclamation's severability clause (Pet. Br. 74)—"piecemeal relief would fragment immigration policy" where the Constitution and Congress require that such laws "'should be enforced vigorously and *uniformly*.'" (Pet. App. 62a); *see IRAP II*, 883 F.3d at 273 (similarly invoking importance of uniform enforcement of immigration law in support of nationwide injunction). Indeed, this Court reaffirmed the importance of treating similarly situated individuals alike under the policies set forth in the Proclamation's predecessors when the Court preserved the previous preliminary

injunctions "with respect to... those similarly situated [to respondents]." 137 S.Ct. at 2087.

Uniform application of federal immigration policy by virtue of a nationwide injunction is necessary in cases like this for another reason: in the immigration context, "[g]eographically limited injunctions are sure to create confusion" or "be impossible to implement in practice."[75] For example, after a Massachusetts district court issued an injunction enjoining portions of the initial Executive Order only as to individuals arriving to the country at Boston's Logan Airport, *see Tootkabani v. Trump*, No. 17-cv-10154 (D. Ma. 2017), some foreign nationals entered the country through that point of entry and then traveled on to other States—"rendering the geographic limit on the injunction pointless" by making that part of the ban that was not enjoined functionally inoperative—while others "were barred from boarding flights headed to Logan despite the court order because airline personnel and other officials were confused about what the law required of them in light of the limited injunction."[76] Travel among the 50 States by a non-citizen lawfully present in one of them is not restricted, and immigration policies must "be comprehensible to the noncitizens who must follow them and other actors who must interpret and apply them (such as airlines)."[77] *See Lemon v. Kurtzman*, 411 U.S. 192, 200

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[75] Frost, The Role and Impact of Nationwide Injunctions By District Courts, Written Testimony for the H. Comm. on the Judiciary, at 8 (Nov. 30, 2017) (internet).

[76] *Id.* (citing Sacchetti, *Confusion Rules After Court Order Temporarily Halts Trump Immigration Ban*, Boston Globe (Jan. 30, 2017) (internet)).

[77] *Id.* at 5,7-8.

(1973) ("equitable remedies" look to "what is necessary, what is fair, and what is workable"). Anything short of a nationwide injunction in the present case will implicate these very same concerns.

B. The Need for a Nationwide Injunction in This Case Is Not Outweighed by Any Other Consideration.

Contrary to petitioners' claim (Br. 75), nationwide injunctions have long been "a regular feature of the equitable jurisprudence of federal courts."[78] And despite some commonly identified disadvantages,[79] courts adjudicating facial challenges have not hesitated to issue or affirm nationwide injunctions upon ultimately concluding that the challenged federal action is unlawful. For example, "when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (CADC 1998); *see also Dimension Fin. Corp. v. Board of Governors, Fed. Reserve Sys.*, 744 F.2d 1402, 1411 (CA10 1984) (enjoining Board from "attempt[ing] to enforce or implement" regulations that exceeded its rule-making authority), *aff'd*, 474 U.S. 361 (1986). But even if nationwide injunctions should not necessarily issue against the federal government every time a court upholds a challenge to a federal law or policy, there is no reason to categorically eliminate the

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[78] Siddique, *Nationwide Injunctions*, 117 Columbia L. Rev. 2095, 2097 (2017) (collecting cases).

[79] *Id.* at 2124-25; Frost, *supra* at 8-10.

availability of such relief in appropriate cases (Pet. Br. 75-76).[80] Here, in addition to being "necessary to provide complete relief," *Madsen*, 512 U.S. at 765, the injunction is essential in light of the nature of the violations, the need for uniform and workable enforcement of immigration policy, and the nationwide harm that the public would suffer in the absence of such relief. See *supra* 29-32.

Neither of petitioners' two specific concerns (Br. 75-76) casts any doubt on the propriety of the injunction in this case. *First*, contrary to petitioners' suggestion, the nationwide injunction in this case does not in any way defeat the orderly development of the law. To be sure, the percolation of legal issues in the lower courts is an important feature of our judicial process. But one of the primary rationales for seeking such diversity in judicial perspectives is "to gain the benefit of adjudication by different courts *in different factual contexts*." *Califano*, 442 U.S. at 702 (emphasis added). Here, little would be gained by additional debate in other courts on the questions presented in this appeal

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[80] *See* Frost, *supra*; Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 Harv. L. Rev. F. 56 (2017); Amdur & Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 Harv. L. Rev. F. 49 (2017). Even the contrary authority cited by petitioners (Br. 73, 75) candidly acknowledges that the "case of national injunctions is strongest for preliminary injunctions, because they preserve the status quo in the sense of ensuring that the plaintiff is not irreparably injured before judgment and the court is not robbed of its ability to decide the case." Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 476 n.333 (2017).

because the challenge does not depend on any individualized or disputed facts.[81]

Moreover, a nationwide injunction enjoining enforcement of a federal law or policy in one court does not necessarily "bring[] judicial review in all other fora" to a halt, as petitioners incorrectly contend (Br. 75). Nothing about such relief prevents other parties from pressing their own claims in other courts. For example, in the recent litigation over the Deferred Action for Childhood Arrivals program, even after district court judges in both California and New York issued nationwide injunctions enjoining the program's rescission and appellate review of those rulings is pending, a Maryland district court drew a different conclusion about the likely legality of the program's rescission.[82] And both the Hawaii district court in this case and a Maryland district court hearing the related challenge to the Proclamation in *IRAP II*, issued their own separate injunctions.

Second, petitioners are mistaken in suggesting (Br. 75-76) that Congress has expressed a preference for class actions, rather than actions by sovereign States, as a means of obtaining broad relief against unconstitutional or illegal federal action. To the contrary, when Congress has imposed limitations on class actions, it has consistently made clear that those

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[81] *See* Amdur & Hausman, *supra* at 52-53 & n.6 (discussing subsequent criticism of "the notion of percolation for percolation's sake" by former Chief Justice Rehnquist, author of *United States v. Mendoza*, 464 U.S. 154 (1984)).

[82] *Compare Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018), *and Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018), *with Casa de Maryland v. U.S. Dep't of Homeland Sec.*, 2018 WL 1156769 (D. Md. 2018).

limitations do not apply to actions brought by States. *See, e.g.*, 15 U.S.C. §78bb(f)(4) (federal preemption of private state court class actions for securities fraud does not apply to actions brought by States); *see also LG Display Co. v Madigan*, 665 F.3d 768 (CA7 2011) (antitrust actions brought by States not subject to restrictions of the Class Action Fairness Act, 28 U.S.C. §1332(d)). While the interests vindicated by States as plaintiffs may overlap with the interests of their residents, the States here seek to challenge a federal policy based on widespread harms to their *own* proprietary and sovereign interests. It is inconceivable that a sovereign State would be required to bring or join a class action to vindicate its own institutional interests. Moreover, the affected residents in our States are often poorly situated to file suit themselves or to form or join a class; thus, a class action is not a viable alternative.[83]

Finally, principles of judicial economy counsel against restricting relief here to Hawaii, and requiring each of amici States to file and litigate to judgment their own individual lawsuits challenging the Proclamation in order to vindicate the same interests. *See, e.g., National Mining*, 145 F.3d at 1409 ("refusal to sustain a broad injunction is likely merely to generate a flood of duplicative litigation"). Indeed,

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[83] Malveaux, *supra* at 64 ("Many of the current administration's executive orders target the most vulnerable populations in our society—including various minorities, immigrants, and children."); *see* Bray, *supra* at 476 (acknowledging that in the travel ban challenges, a class might not permissibly include "everyone affected by the [ban] restricting entry from [designated] countries," but rather, only "all travel agents, for example").

although six of the undersigned States had jointly filed a separate suit, a Washington district court stayed that action once the appeal was taken from the injunction in this case,[84] and the Ninth Circuit denied the subsequent motion of those States to intervene here.[85] The interests of Hawaii are replicated throughout the Nation; the legal issues are the same everywhere, and no judicial interest would be served by restricting the geographic scope of the injunction in this case as petitioners request.

In sum, there was no abuse of discretion in fashioning the injunctive relief at issue here, *see McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 867 (2005). As we have explained, the provisional relief granted against petitioners is appropriate in light of nature of the violations, the need for uniform and practically enforceable immigration policy, and the truly irreparable nationwide harm that our States and our residents would suffer in the absence of such relief. Anything short of a nationwide injunction will allow numerous public harms to continue, or require duplicative litigation throughout the Nation. Thus, affirmance of the preliminary injunction is necessary to provide continued interim relief to amici States from the cumulative effects of petitioners' series of discriminatory bans.

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[84] *Washington v. Trump*, No.17-cv-141 (W.D. Wash. 2017), ECF No.209.

[85] *Hawaii v. Trump*, No.17-17168 (CA9 2017), ECF No.61.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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